

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 45
Request for Regulatory)
Determination filed by ROY) [Docket No. 97-002]
E. RUTZ concerning)
Information Bulletin No. 94-) December 11, 1998
04-BCII issued by the)
DEPARTMENT OF JUSTICE) Determination Pursuant to
which implements the) Government Code Section 11340.5;
statutory requirements of the) Title 1, California Code of
Basic Firearms Safety) Regulations, Chapter 1, Article 3
Certificate program¹)
_____)

Determination by: EDWARD G. HEIDIG, Director

CHARLENE MATHIAS, Deputy Director
HERBERT F. BOLZ, Supervising Attorney
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SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a bulletin issued by the Department of Justice constitutes a "regulation," which is void unless adopted pursuant to the Administrative Procedures Act ("APA"). The bulletin describes the Department's Basic Firearms Safety Certificate ("BFSC") program. OAL has concluded that the bulletin is a "regulation," which must be promulgated in accordance with the APA in order to be valid.

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ISSUE

The issue presented to the Office of Administrative Law is whether Bulletin No. 94-04-BCII, which specifies:

- 1) Basic Firearms Safety Certificate record keeping requirements for firearms dealers, and
- 2) Minimum standards for the Basic Firearms Safety Certificate course and related procedures, requirements and fees

is a “regulation” and is therefore without legal effect unless adopted in compliance with the APA.

The Office of Administrative Law has concluded that Bulletin No. 94-04-BCII issued by the Department of Justice is a “regulation” required to be adopted in compliance with the APA. The requirements, standards, and fees are invalid until properly adopted as regulations. OAL notes that the Department recently initiated a rulemaking proceeding concerning the Basic Firearms Safety Program pursuant to the APA by publishing a notice in the California Regulatory Notice Register on October 9, 1998.²

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT?

Government Code section 15000 provides:

“There is in the State Government a Department of Justice. The department is under the direction and control of the Attorney General.”

The California Constitution, Article 5, Section 13, provides that “[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State.” The APA applies to *all* state agencies, except those “in the

judicial or legislative departments."³ Since the Department is in the executive branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Department.⁴

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁵ the California Court of Appeal upheld OAL's two-part test⁶ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*

- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies the above two parts of the test, OAL must conclude that it is a "regulation" and is subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁷

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

The challenged rules are contained in Bulletin No. 94-04-BCII, which was issued by the Department to describe its Basic Firearms Safety Certificate ("BFSC") course. The bulletin first describes changes in the law effective April 1, 1994, which require handgun purchasers to obtain a BFSC or show proof of exemption from this requirement. The bulletin goes on to identify:

- (1) Exemption code reporting requirement and form (Attachments E and F to the bulletin),
- (2) Procedures to become a Department of Justice course provider (Attachment A to the bulletin),

- (3) Standards for prospective instructors, and instructor certification application form.
- (4) DOJ certified course minimum requirements, and course certification application form.
- (5) Fee structure (Attachment B to the bulletin).

From the descriptions above, it is readily apparent that the challenged rules *apply* to all firearms dealers who would offer the BFSC course, and *affect* all persons who will take a BFSC course by prescribing its contents. People will take such a course so they can obtain the BFSC certificate required by Penal Code section 12802 of all persons, not otherwise exempt, who wish to purchase or borrow a firearm capable of being concealed upon the person. An agency standard applies generally if the rule applies to all members of a class, kind or order.⁸ The challenged rules apply statewide to the firearms dealers and prospective purchasers of firearms described above, and are therefore standards of general application.

B. DO THE CHALLENGED RULES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

In 1991 the Legislature determined that existing laws did not assure that persons purchasing pistols, revolvers, and firearms capable of being concealed upon the person would be knowledgeable in the safe use, handling and storage of these weapons. To remedy this situation, it enacted Article 8 "Basic Firearm Safety Instruction and Certificate,"[sections 12800 - 12809] in Chapter 6, Title 2, Part 4 of the Penal Code ("Article 8"). Section 12802 provides, in part, that:

"[n]o basic firearms safety certificate shall be issued to any person unless that person has complied with this article."

Penal Code section 12803 (since amended) provided, in part:

"(a) Beginning on January 1, 1993, and prior to July 1, 1993, the

Department of Justice shall do all of the following:

- “(1) Develop the course content and instructional materials for a basic firearms safety course. The course shall consist of not less than two, nor more than four, hours of instruction, including, but not limited to, instruction in the following areas as they pertain to pistols, revolvers, and other firearms capable of being concealed upon the person:
 - (A) The safe use, handling, and storage of those firearms.
 - (B) Methods for childproofing those firearms.
 - (C) The laws applicable to the carrying and handling of those firearms.
 - (D) The responsibilities of ownership of those firearms.
- “(2) Develop an instructional manual
- “(3) Prescribe a minimum level of skill, knowledge, and competency to be required of all basic firearms safety instructors, and develop and provide the guidelines to be used to certify the instructors.”

The challenged bulletin was issued for the express purpose of providing “a brief overview of the BFSC Program and the DROS [dealer’s record of sale] processing procedures related to the BFSC Program.”⁹

(1) The requester’s chief concern is the record keeping requirements for firearms dealers specified in the bulletin.¹⁰ In particular, he objects to the requirements applicable to the exemption “register” [roster]. These are found in Attachments E and F to the bulletin. Attachment E is a list of the categories of persons exempt from the requirement for a BFSC certificate pursuant to Penal Code section 12081 and associated exemption codes. It also provides:

“The exemption code is required reporting on the DROS document and the Exemption Roster.”

Attachment F is a form to be used by firearms dealers for reporting information concerning all purchasers of weapons subject to Article 8, who were granted exemption from the requirement for a BFSC certificate. The dealer’s completion of the DROS document is required by other laws,¹¹ but the Exemption Roster was a new requirement created in Attachments E and F. Both Attachments implement Penal Code sections 12801 and 12803 by specifying reporting requirements for exempt sales. The exempt sales reporting requirements are “regulations” that should have been adopted pursuant to the APA.

(2) The requester also complained of the other requirements contained in the bulletin. Those other requirements establish the Department’s administrative procedures for the BFSC certificate, prescribe minimum course content and related standards, and set fees for the course and certificate. With regard to administrative procedures, for example, “Attachment A” to Bulletin No. 94-04-BCII lists the steps a firearms dealer may take in order to become an approved DOJ course provider. It requires the completion of application / renewal form 4344, submission of a copy of one of several possible licenses or permits, and signing of the BFSC course provider certificate. It also specifies that the certificate is valid for three years. Each of these provisions interprets, implements and makes specific a provision of Article 8 or governs the Department’s procedures for the implementation of Article 8, and is therefore a “regulation.”

The Department’s bulletin includes several pages related to BFSC course certification. A page entitled “DOJ COURSE CERTIFICATION PROCESS” is an overview. It requires applicants to complete application form BCII 4346 and submit a course outline. It states that courses submitted for certification “must encompass all of the information outlined in the minimum certification requirements” It also includes information prescribing the manner in which courses will be approved or rejected. Each of these challenged rules interprets, implements and makes specific a provision of Article 8 or governs the Department’s procedures. For example:

- (a) The requirement for an outline is a rule which governs the Department's procedure for course evaluation.
- (b) The form BCII 4346 is a check list of all the topics the Department has decided a course must include. An applicant must include instruction on all these subjects, and identify the location in the course outline where the subjects are mentioned. The specification of the BFSC course content implements Penal Code section 12803, which directed the Department to "[d]evelop the course content and instructional materials for a basic firearms safety course." Section 12803, subdivision (a)(1), requires the BFSC course to include "instruction in the following areas as they pertain to pistols, revolvers, and other firearms capable of being concealed upon the person:

"(A) The safe use, handling, and storage of those firearms.

"(B) Methods for childproofing those firearms.

"(C) The laws applicable to the carrying and handling of those firearms.

"(D) The responsibilities of ownership of those firearms."

The Department's form BCII 4346 check list breaks these four general areas into eight subgroups, comprised of thirty-seven items of "specific information that must be included in all DOJ certified courses in basic firearms safety."¹² For example, on the topic of *storage*, the checklist requires a course to include the following information:

- "Firearms must be unloaded when in storage.
- "Firearms and ammunition should be stored separately.
- "Firearms must be securely locked when in storage.

- “Discussion of the different types of locking containers and locking devices available including: commercial safes and vaults; locking security boxes; trigger locks; chain and cable open action locks.”

By issuing this checklist to carry out the mandate of Penal Code section 12803, the Department has implemented the statute and made it more specific. The checklist is therefore a “regulation,” which should have been adopted pursuant to the APA.

- (c) Attachment B to Bulletin No. 94-04-BCII sets fees for the course and certificate. It provides:

“DOJ course providers must comply with the following:

“1. . . .

- “2. The following are the fees which DOJ course providers can charge for BFSC issuance:

- “ • \$20 for administering the objective test. This \$20 fee reimburses you for the \$10 cost of the prepaid BFSC, as well as \$10 to cover personal expenses. This fee allows the applicant to take the test a second time if the first test is failed.
- “ • \$10 plus a fee to be determined by the DOJ course provider for giving the DOJ video course. This fee reimburses you for the \$10 cost of the prepaid BFSC plus any other expenses deemed appropriate by the individual course provider.”

In setting these fees the Department has exercised its discretion and implemented Penal Code Section 12809, subdivision (c), which provides, in part:

“The Department of Justice shall set the fee for taking the objective test and issuance of the basic firearms safety certificate at an amount commensurate with the actual cost to the department, but not to exceed twenty dollars (\$20), ten dollars (\$10) of which shall be forwarded to the department to cover its costs.”

By setting the fee to cover personal expenses of the course provider at \$10, the Department has exercised its discretion by fixing the amount at the maximum allowed under Penal Code section 12809, rather than some other amount. Attachment B to Bulletin No. 94-04-BCII implements section 12809 and is therefore a “regulation.”¹³

For the reasons described above, each of the foregoing provisions is a “regulation” within the meaning of Government Code section 11342, subdivision (g). The challenged rules apply generally, and were issued to interpret, implement and make specific statutes enforced by the Department, or govern its procedure. These “regulations” should have been adopted pursuant to the APA.

III. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY ESTABLISHED EXPRESS GENERAL EXCEPTION TO APA REQUIREMENTS?

The APA provides a limited number of general exceptions to its rulemaking requirements.¹⁴ The APA excepts policies which pertain solely to the internal management of a state agency from the notice and hearing requirements of the act.¹⁵ However, as the *Grier* Court found: “. . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow.”¹⁶

Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to “. . . the rules necessary to properly consider the interests of all who will seek consideration under the provisions of the statutes dealing with review and allocations.”¹⁷ The rule at issue in this determination clearly deals with the interests of all who would offer BFSC certificates under Penal Code section 12803. Accordingly, the Department’s

bulletin is not covered by the internal management exception to the APA.

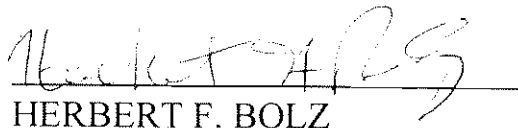
CONCLUSION

For the reasons set forth above, OAL concludes that Bulletin No. 94-04-BCII, which specifies:

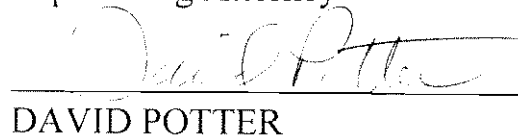
- 1) Basic Firearms Safety Course Record keeping requirements for firearms dealers, and
- 2) Minimum standards for the Basic Firearms Safety Certificate Course and related procedures, requirements and fees

contains "regulations" that are without legal effect unless adopted in compliance with the APA. No exceptions to APA requirements are applicable.

DATE: December 11, 1998


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ENDNOTES

1. This determination was requested by Roy E. Rutz., "requester," of 5800 Hackomiller Road, Garden Valley, CA 95633. The State Department of Justice was represented by Nick Dedier, Director, Division of Criminal Justice Information Services, 4949 Broadway, E231, Sacramento, CA 95820, (916) 227-2222.

On September 11, 1998, OAL published a summary of this Request for Determination in the California Regulatory Notice Register ("CRNR") 98, No. 37-Z, p. 1812, along with a notice inviting public comment. No public comments were received. The Department of Justice filed a response to the request for determination.

2. California Regulatory Notice Register 98, No. 41-Z, October 9, 1998, p. 1986.
3. Government Code section 11342, subdivision (a). See Government Code sections 11346; 11343.
4. See, *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
5. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

6. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

7. (1990) 219 Cal.App.3d 422, 438; 268 Cal.Rptr. 244, 253.
8. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622; 167 Cal.Rptr.552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class.)
9. Bulletin No. 94-04-BCII, dated 1/26/98, page one, paragraph 3.
10. Request for determination dated March 5, 1994, page 1, paragraph 2.
11. Penal Code section 1273, subdivision (a).
12. Bulletin No. 94-04-BCII, dated 1/26/98, unnumbered page entitled "DOJ CERTIFIED COURSE MINIMUM REQUIREMENTS."
13. See 1986 OAL Determination No. 5 (Board of Osteopathic Examiners, August 13, 1986, Docket No. 85-002) California Administrative Notice Register 86, No. 35-Z, August 29, 1986 p. B-10, B-16, typewritten version, p. 8.
14. Government Code section 11342, subdivision (g).
15. Government Code section 11342, subdivision (g).
16. *Grier v. Kizer, supra*, 219 Cal.App.3d 422, 438; 268 Cal.Rptr. 244, 251, disapproved on another point; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577; 59 Cal.Rptr.2d 186, 198.
17. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408; 131 Cal.Rptr. 804, 820.